In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 909

VINCENT SERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 50) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1970. A petition for rehearing was denied on July 20, 1970. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to November 2, 1970, and on October 27, 1970, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

410-336—70

QUESTIONS PRESENTED

1. Whether the judge who presided at petitioner's trial properly declined to disqualify himself from ruling on the present motion to vacate sentence.

2. Whether petitioner's motion to vacate sentence was properly denied without a hearing.

3. Whether separate and cumulative sentences were properly imposed for the conspiracy and aiding and abetting offenses relating to the passing of counterfeit money.

STATEMENT

After a trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on three counts of an indictment which charged conspiracy and the possession and the passing of counterfeit $10 bills, in violation of 18 U.S.C. 371 and 472. On July 31, 1963, he was sentenced to consecutive sentences totalling thirteen years' imprisonment. His conviction was affirmed and a petition for a writ of certiorari denied. 381 U.S. 912. Subsequently a motion for a new trial based on allegedly newly discovered evidence was denied by the district court; the court of appeals affirmed and a petition for a writ of certiorari was denied. 389 U.S. 843. The present proceeding arose under a motion pursuant to 28 U.S.C. 2255, in which petitioner again alleged that he had newly discovered evidence. The district court denied the motion without a hearing (Pet. 47–48) and the court of appeals affirmed (Pet. 50).

Petitioner's present allegations must be evaluated against the evidence at the trial and on the prior mo-

tion. The trial evidence which is set forth in more detail in the government responses to the prior petitions (O.T. 1964, No. 1011 and O.T. 1967, No. 320) showed that petitioner, an Ohio attorney, spoke with one John Paladinich in 1962 about passing counterfeit money that petitioner expected to receive. On January 3, 1963, both men met at the home of co-defendant Strollo. Paladinich was given a quantity of counterfeit bills to pass and received permission to include his brother, Joseph, as passer of the bills. The next morning, the Paladinich brothers began passing the bills; about 11:30 a.m., the proceeds of the morning's work were turned over to petitioner. Later that day, Joseph was apprehended in Warren, Ohio while attempting to pass a counterfeit bill. On the following day, petitioner went to the jail where Joseph was being held and urged him not to incriminate the others; however, during an interview by federal agents on January 5, Joseph voluntarily disclosed what he knew about the counterfeiting operation and agreed to cooperate with the government.

On January 25, 1963, the Paladinich brothers arranged a meeting with petitioner at a public place to inquire about resuming the passing of counterfeit bills. A federal agent observed the meeting and overheard portions of the conversations. Petitioner indicated that such passing might be too risky for Joseph, though safe enough for John. Petitioner placed a telephone call and was heard to say: "We can handle all you want." He then told the brothers that

the counterfeit bills would soon be "ready to move" and he would be in touch with them.

On the night of January 31, 1963, petitioner and co-defendant Strollo met with John Paladinich and one Armstrong at Strollo's bar in Youngstown. Petitioner and Strollo directed the other two men to go to Columbus, Ohio to pass the counterfeit money. They did so and there passed several counterfeit $10 bills before Armstrong became fearful of apprehension.

In his first motion for a new trial, petitioner alleged that he had recently learned, through one Mildred Socie, that John Paladinich gave her husband, Raymond Socie, some plastic plates and some bottles containing green and black paste in late 1962 to store in the Socies' cellar; that John Paladinich and Raymond Socie discussed "a connection for the paper and press"; that John Paladinich retrieved the plates and bottles in the last week of December, 1962; that thereafter Paladinich delivered "a lot of money" to Raymond Socie, saying that the "guy didn't roll off too much as he didn't have enough paper"; and that on January 4, 1963, Paladinich returned and told Socie that his brother was in jail. It was also alleged that Raymond Socie had, before trial, given a confession to a Youngstown police officer.

In the present proceeding (App. 2–12) [1] petitioner alleged that the testimony of Mildred Socie would show that the counterfeit money was manufactured under the direction of John Paladinich (App. 9), and

[1] "App." references are to petitioner's appendix in the court of appeals, a copy of which we are filing with the Court.

that during the two weeks before February 8, 1963, a detective agent named Bernat conspired to "frame" petitioner (App. 10). Petitioner also claimed trial errors and challenged the imposition of consecutive sentences.

ARGUMENT

1. Contrary to petitioner's assertion (Pet. 7, 39–41), the district judge who had presided at his 1963 trial was not precluded from determining the merits of his 2255 motion. One of the purposes of 18 U.S.C. 2255 statute was to relieve judges having no antecedent knowledge of the case from the onerous task of delving into an unfamiliar record. *United States* v. *Hayman*, 342 U.S. 205; *Mirra* v. *United States*, 379 F. 2d 782, 788 (C.A. 2), certiorari denied, 389 U.S. 1022; *United States* v. *Smith*, 337 F. 2d 49, 53 (C.A. 4), certiorari denied, 381 U.S. 916.

2. Petitioner urges that since his 2255 motion is based on newly discovered evidence *dehors* the record it can not properly be disposed of on the files and records in the case but requires an evidentiary hearing. (Pet. 16). The files and records show, however, that the matters presently relied upon by petitioner have either been raised and disposed of in an earlier proceeding or are without merit on their face. In this situation, a hearing is not required. See *Sanders* v. *United States*, 373 US 1, 20–21.

The contention that allegedly new evidence, tending to show John Paladinich's involvement in the manufacture of counterfeit bills, undermines the government's case was previously raised and considered by

this Court in the October 1967 Term on review of the denial of his motion for new trial. As we then pointed out (No. 320, O.T. 1967, p. 6), even if the allegations are accepted, they suggest only that in addition to discussing the passing of counterfeit notes with petitioner in the fall of 1962, Paladinich found a temporary storage place for what might have been some of the printing paraphernalia, and that he gave Socie, as well as his brother, some of the notes to cash.

Petitioner argues that since agent Bernat began to advise John Paladinich on or about January 21, 1963, evidence of petitioner's meetings with the Paladinich brothers on or after that date was inadmissible since, it is claimed, such meetings could not have been in furtherance of the charged conspiracy but, instead, must have been in furtherance of an effort to "ensnare" petitioner (Pet. 5, 12, 16–17, 20–21, 27, 30, 32, 38). That the Paladinich brothers were co-operating with the government after January 5, 1963, was known at the trial. It was, however, clear that the conspiracy among the others, including Armstrong, was continuing; thus, what petitioner said and did after January 21 was clearly admissible against him.

Petitioner contends that he has new evidence that Joseph Paladinich's statement used at trial had been given either on January 21 or February 21, 1963, but not on January 5, as stated at the trial (Pet. 6, 19, 20, 22, 23, 38). The record shows that Joseph may have given an oral statement on January 5 and a written statement at a later date (App. 58–60); upon inquiry,

by the jury, the trial judge first stated that his recollection was that the statement had been given on January 5 (App. 56), but he thereafter had Joseph Paladinich's testimony concerning the date of the statement read to the jurors by the court reporter (App. 57).[2] Moreover, since Joseph had testified as to the date, petitioner's present contention that the response by the court amounted to a denial of the right of confrontation (Pet. 6, 19, 31) is without merit.

The introduction at trial of co-defendant Zappia's pretrial statement (Pet. 6–7, 18–19) is alleged to have violated the rule laid down by this Court in *Bruton* v. *United States*, 391 U.S. 123. However, since Zappia took the stand and testified, there plainly was no denial of the right to confront him. See, *e.g.*, *Rios-Ramirez* v. *United States*, 403 F. 2d 1016 (C.A. 9), certiorari denied, 394 U.S. 951; *United States* v. *Marine*, 413 F. 2d 214 (C.A. 7), certiorari denied, 396 U.S. 1001.

3. Petitioner also asserts that consecutive sentences were improperly imposed on the three counts, arguing that the conspiracy count and the substantive (aiding and abetting) counts charged parts of a single offense (Pet. 35–37). It is, however, well settled that both the substantive offenses of aiding and abetting and the conspiracy offense involve discrete elements and may be punished by cumulative sentences. *Pereira* v. *United States*, 347 U.S. 1, 11–12; *United States* v. *Krol*, 374

[2] The date of the written statement, used by the defense in an effort to impeach Joseph's trial testimony (App. 58–59), was not material.

F. 2d 776, 778 (C.A. 7), certiorari denied, 389 U.S. 835; See *Callanan* v. *United States*, 364 U.S. 587, 593; *United States* v. *Parzow*, 391 F. 2d 240 (C.A. 4), certiorari denied, 393 U.S. 823.

CONCLUSION

For the reasons states, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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